quite akin to this but not on all fours is the case of *R.* v. *Thames Magistrates' Court, ex parte Polemis.*[5] There the applicant, a Greek master of a vessel, who had little knowledge of English asked that his conviction by the Thames Magistrates' Court on July 11, 1973 be quashed. The facts of that case are that at 11.30 a.m. on July 11, 1973 a summons was served on the applicant charging that he was the master of a vessel from which oil or a mixture containing oil had been discharged into navigable waters, contrary to the Prevention of Oil Pollution Act 1971. The applicant's vessel was due to sail at 9.00 p.m. on that day and the summons was returnable at the magistrates' court at 2.00 p.m. on that day. At 2.30 p.m. the case came up before a bench of lay justices who rejected an application for adjournment, apparently impressed by the fact that the applicant's vessel was due to sail that evening. As concession however they stood over the hearing until 4.00 p.m. on the same day. At 4.00 p.m. the justices were still occupied with their own list and so the case was transferred to a stipendiary magistrate then sitting in the same building, who heard the case and convicted the applicant. The conviction was quashed and it was held that it was a requirement of the rules of natural justice that a party to proceedings, and particularly the defendant in a criminal case, should be given a reasonable opportunity to present his case, and that included a reasonable opportunity to prepare his case before being called upon to present it. In the judgment of Lord Widgery C.J. in that case the following would provide a good guideline on cases of this nature. He said at page 1225:

"Of course it would then be for their consideration as to what steps could properly be taken to make sure that the captain, the fine and all other trace of the affair did not slip away with the tide. But they would have no difficulty within the powers open to them in taking appropriate steps to that end. One bears in mind to start with that they had the power to remand the captain in custody, which would most effectively ensure that he was still available for disposal on the adjourned hearing date. One does not imagine that in practice such an extreme course would be necessary, but the possibility of that being available as a last resort would no doubt stimulate the shipowners in cases of this kind to make some useful alternative suggestion, either by the provision of sureties for bail, or the deposit of a sum of money for any potential fine or otherwise."

In the circumstances of the present case where the tourist bus was to leave immediately for its destination, wherever it was, our Criminal Procedure Code (F.M.S. Cap. 6) provides ample powers for the court to deal with the situation. The powers are provided in section 49 of the Criminal Procedure Code which reads as follows:—

"49. When any person for whose appearance or arrest any court is empowered to issue a summons or warrant is to present in such court it may require such person to execute a bond with or without sureties for his appearance in such court."

As Spenser Wilkinson J. said in *Lim Seng Gin & Anor.* v. *Regina*[6] there is no doubt that this section confers a wide discretion upon the magistrate to require a person to execute a bond in a proper case and that the wording of that section is sufficiently wide to include also accused persons. In every case of this nature the magistrate should consider invoking this section provided of course that the discretion should be judicially and properly exercised in each case.

Another observation of Lord Widgery C.J. in *Re: Polemis, supra,* is also relevant where he said at page 1223:

"It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say, 'Well, even if the case had been properly conducted, the result would have been the same.' That is mixing up doing justice with seeing that justice is done, so I reject that argument."

On the bare facts as recorded by the president I would under ordinary circumstances consider whether to substitute for the conviction for dangerous driving a conviction for inconsiderate driving under section 36(1) of the Road Traffic Ordinance, 1958. But, in my view, for the better justice of this case and having regard to the fact that there are some unsatisfactory features of the proceeding, which have clearly resulted in a miscarriage of justice, I would prefer to quash the conviction absolutely. A proper investigation to the case shall be carried out following the complaint of the magistrate and that the defendant be re-tried subsequently for any offence that may be disclosed.

The conviction is therefore quashed and the order of the president set aside. The fine imposed to be refunded to the defendant.

Conviction quashed.

RE KUMARAENDRAN, AN ADVOCATE & SOLICITOR

[A.Cr.J. (Abdoolcader J.) March 28, 1975]
[Ipoh — Criminal Revision No. 6 of 1975]

Legal Profession — Advocate & solicitor — Contempt of court — Exchange of words between advocate and President of Sessions Court — President exercising powers of summary punishment — Principles of showing cause — Rules of Natural Justice — Imprisonment order invalid.

Subordinate Courts Act, 1948 — Third Schedule, para 26.

Federal Constitution, art. 126.

The advocate and solicitor in this case was defending an accused person charged with an offence under the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958. The record of the proceedings before the President of the Sessions Court showed that the advocate was "shouting and behaving in a manner which is most unexpected". The advocate made an application for the case to be heard before another President. The advocate said that if this application was not granted he would apply to be discharged from further acting for the accused. The President then allowed the application for the discharge of the advocate. The advocate then made the following remarks in court:

"If you say this (referring to the President's ruling), outside the court, I will take on (sic) you certainly".

The President of the Sessions Court then ruled that the advocate had committed contempt of court and committed the advocate to two days imprisonment. On exercise of criminal revision.

Held: (1) there is no doubt that the words uttered by the advocate constituted insulting and contumacious behaviour in outrageous and provocative language tantamount to a deliberate challenge to the authority of the learned President and was clearly a gross contempt in the face of the court;

(2) the power given to Sessions and Magistrate's Courts to take cognisance of any contempt of court and award

punishment therefor in para 26 of the 3rd Schedule to the Subordinate Courts Act 1948 is to be exercised in such extent and in such manner as may be prescribed by Rules of Court. There are rules of court in this context which statutorily embodies and enacts the principles of showing cause;

(3) the learned President, perhaps understandably acting in the heat of the moment immediately committed the advocate to imprisonment for two days, without distinctly stating the specific offences charged against the advocate and without giving him an opportunity of answering the charge. This was in breach of the rules of natural justice and in utter disregard of Order XXXVIII rule 1 of the Subordinate Courts Rule, 1950, or at least the principle underlining it. The order of committal was therefore unsustainable in law and invalid.

Per Abdoolcader J.: "... it is the duty of counsel appearing before them (Presidents and Magistrates) to act fearlessly and with all the force and vigour at their disposal in the interest of the cause they represent but wholly within the bounds of propriety and courtesy in the discharge of their duties as officers of the court. Counsel appearing before these courts must equally remember that in the discharge of their duties they must judiciously use the right and privilege of appearing as such in these courts and not abuse it, and that their conduct must at all times accord with that decorum and dignity...."

Cases referred to:-

(1) *McKeown* v. *The King* (1971) 16 D.L.R. (3rd) 390, 408.

(2) *Balogh* v. *St. Albans Crown Court* [1974] 3 W.L.R. 314, 319.

(3) *Parashuram Detaram Shamdasani* v. *King-Emperor* [1945] A.C. 264, 270.

(4) *Izuora* v. *The Queen* [1953] A.C. 327.

(5) *Karam Singh* v. *Public Prosecutor* [1975] 1 M.L.J. 229.

(6) *Watt* v. *Ligertwood* (1874) L.R. 2 H.L. Sc. 361.

(7) *In re Pollard* (1869) L.R. 2 P.C. 106, 120.

(8) *Chang Hang Kiu* v. *Piggott* [1909] A.C. 312.

(9) *Appuhamy* v. *R.* [1963] A.C. 474.

(10) *Public Prosecutor* v. *Lee Ah Keh & Ors.* [1968] 1 M.L.J. 22.

(11) *Danchevsky* v. *Danchevsky* [1974] 3 W.L.R. 709.

CRIMINAL REVISION.

Datuk S. P. Seenivasagam (*R. Rasiah* and *Karpal Singh* with him) for the advocate and Solicitor.

Wan Abdul Majid (Deputy Public Prosecutor) for the Public Prosecutor.

Abdoolcader J. (delivering oral judgment): I have called for and examined the record of these proceedings in the Sessions Court at Taiping in the exercise of my powers of criminal revision under section 323 of the Criminal Procedure Code for the purpose of satisfying myself as to the correctness, legality and propriety of the summary order of committal for contempt of court made by the learned president against K. Kumaraendran, an advocate and solicitor of the High Court in Malaya, who I shall hereinafter refer to as "the advocate".

This unfortunate episode arose in the course of a criminal case in which the advocate was defending an accused person charged with an offence under section 4 of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958, on March 17, 1975. In the record of these proceedings the learned president in the course of cross-examination of the second witness for the prosecution by the advocate made the following note:

"[The defence counsel was shouting and behaving in a manner which is most unexpected as he keeps on shouting throughout the whole proceedings, both to the witness and to the court.]"

The advocate then made an application for the case to be heard before another president and the record in this respect and the ruling of the president appears as follows:

"*Defence counsel:* I make an application to be heard before any (sic) P.S.C.

1. The court has informed me that if I misbehave myself, I would be held for contempt and be locked. [The counsel has shouted again out of proportion.]

2. I pray for the case to be heard before any court otherwise, I have no alternative but to discharge myself.

Sgd: Low Hop Bing.
17/3/75.

3. The paramount importance is the interest of the client that this should be heard before any (sic) P.S.C.

Sgd: Low Hop Bing.
17/3.

Ruling of the court:-

In this case, the learned defence counsel has very unjustifiably shouted at the witness and notwithstanding the advice of the court has failed to conduct the case with decorum. The learned defence counsel has absolutely no regard for both the court, the witness and above all the sense of justice. Indeed, the court has been most restrained in allowing a great deal of latitude to the learned defence counsel. In spite of this, the shouting potentialities of the learned defence counsel has been increasingly manifested. Indeed, with such a behaviour of the learned defence counsel, the accused has been effectively deprived of the professional service that he is entitled to on a counsel-client relationship. That being the case, justice is seen to be done if, as suggested by the counsel, the learned defence counsel is discharged.

Having viewed all the circumstances with detachment, I hold that there is no substance in the application of the learned defence counsel and is consequently dismissed. If the learned defence counsel so desires, he may discharge himself.

Sgd: Low Hop Bing.
17/3."

The aftermath of this ruling is recorded in these proceedings thus:

"*Accused:* I wish to engage another counsel. I wish to discharge my counsel.

Defence counsel: I am discharging myself.

Court: Defence counsel is discharged.

Sgd: Low Hop Bing.
17/3.

Accused: I am not in the position to carry on with this case in the absence of a counsel. I wish to retain a new counsel.

Prosecuting Officer: I have no objection.

To 31.3.75 (mention).

Bail extended.

Sgd: Low Hop Bing.
17/3.

Mr. Kumar to Court President: If you say this (referring to my ruling), outside the court, I will take on (sic) you certainly.

Court: The counsel is committing contempt of court and I am exercising my summary power and commit him to two days' imprisonment.

Sgd: Low Hop Bing.
17/3/75.

Defence counsel: I am asking for bail.

Court: No bail granted.

Sgd: Low Hop Bing.
17/3/75."

The advocate, it seems, was then immediately taken into custody but was later released by the Taiping magistrate on a bail bond in the sum of $500 in one surety.

I must accept the last remark of the advocate as recorded by the learned president, which apparently led to the summary order he made, as the unbiased truth in view of the fact that this statement was made in open court in his presence and in his hearing and indeed directed at and to him. There is no doubt that these words ascribed to the advocate certainly constitutes insulting and contumacious behaviour in outrageous and provocative language tantamount to a deliberate challenge to the authority of a learned president and clearly a gross contempt in the face of the court.

Contempt in the face of the court has been, in my view, aptly defined by Laskin J., in his dissenting judgment in the Canadian Supreme Court case of *McKeown* v. *The King*[1] when he said:

"Contempt in the face of the court is, in my view, distinguished from contempt not in its face on the footing that all the circumstances are in the personal knowledge of the court. The presiding judge can then deal summarily with the matter without the embarrassment of having to be a witness to issues of fact which may be in dispute because of events occurring outside."

Lord Denning M.R., in *Balogh* v. *St. Albans Crown Court*,[2] said:

"So 'contempt in the face of the court' is the same as 'contempt which the court can punish of its own motion'. It really means 'contempt in the cognisance of the court'."

I must now advert to the powers vested in the courts in dealing with contempt. The Federal Court and the High Court have always exercised absolute and plenary power of punishment for contempt and this is now enshrined in Article 126 of the Federal Constitution. The power of the subordinate courts is provided for in paragraph 26 of the Third Schedule to the Subordinate Courts Act, 1948, which, briefly, gives power to the Sessions Courts and Magistrate's Courts to take cognisance of any contempt of court and to award punishment for the same, not exceeding, in the case of a Sessions Court, a fine of $300 or imprisonment for 6 weeks, (and in the case of a Magistrate's Court, a more limited penalty) to such extent and in such manner as may be prescribed by rules of court, and it goes on to provide that if the contempt of court is punishable as an offence under the Penal Code, the court may, in lieu of taking cognisance thereof, authorise a prosecution. It is abundantly clear that the learned president in this case purported to act summarily under the first limb of paragraph 26 of the Third Schedule to the 1948 Act.

There are of course the provision of Chapter XXXIV of the Criminal Procedure Code which deal with proceedings in the case of certain offences affecting the administration of justice including section 228 of the Penal Code, but I do not think that the provisions of section 353 *et seq.* therein would apply to a Sessions Court, as section 353 appears to be restricted to an offence committed in the view or presence of any Magistrate's Court, unlike the equivalent provision in section 379 of the Straits Settlements Criminal Procedure Code (which applies in Penang and Malacca) which refers to any civil or criminal court other than the High Court. It may well be that section 353 in F.M.S. Cap. 6 is intended to cover the Sessions Court also, as virtually all the provisions of the Code seem to refer only to a Magistrate's Court but then the definition of "Court" in section 2 and the provisions of section 6 of the Code have the effect of clearly defining the separate and distinct identity of the Sessions Court and Magistrate's Court. On the other hand, section 358 in Chapter XXXIV of the Code gives a right of appeal to any person sentenced by any *lower Court* under the provisions of that Chapter. It is however not necessary to consider this aspect any further except perhaps to observe that there would appear to be a statutory infirmity in the Code which calls for speedy legislative relief.

However, it is settled law that the courts will not readily as a matter of course exercise their powers of summary punishment for contempt in the face of the court and it has been reiterated time and again that this power should be used only sparingly. Lord Goddard C.J. said in *Parashuram Detaram Shamdasani* v. *King-Emperor*: [3]

"Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possesses; its usefulness depends upon the wisdom and restraint with which it is exercised. . . ."

This case was cited with approval and applied by the Privy Council in *Izuora* v. *The Queen*.[4]

In *Balogh* v. *St. Albans Crown Court, supra,* the Court of Appeal in England held that because the power to summarily punish a contemnor for contempt is arbitrary, contrary to natural justice, and far removed from the ordinary processes of the law, it is to be exercised with scrupulous care and only when it is imperative for the court to act immediately; and it must never be invoked unless nothing else will do to protect the ends of justice. And indeed Raja Azlan Shah F.J. had occasion to observe to the same effect not so long ago in a case involving another advocate and solicitor.[5]

The power to take cognisance of any contempt of court connotes summary disposal of the matter as an offence without the formality of a charge or complaint. Punishment for contempt in the face of the court which may be imprisonment or a fine can be imposed immediately and without notice (*Watt* v. *Ligertwood*[6]), but it has however been firmly established that:

"no person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him." (*In re Pollard*[7]).

The Privy Council followed this decision in the later case of *Chang Hang Kiu* v. *Piggott*[8] and affirmed it again in *Appuhamy* v. *R.*,[9] Ali J., (as he then was) applied this very principle in *Public Prosecutor* v. *Lee Ah Keh & Others*.[10] It is therefore abundantly clear that in such cases it is necessary that the contempt should be distinctly stated and that the alleged contemnor should be given an opportunity of answering the charge.

As I have already stated, the power given to the Sessions and Magistrate's Courts to take cognisance of any contempt of court and to award punishment therefor in paragraph 26 of the Third Schedule to the 1948 Act is to be exercised to such extent and in such manner as may be prescribed by rules of court. There are indeed rules of court in this context in Order XXXVIII of the Subordinate Courts Rules, 1950, rule 1 of which statutorily embodies and enacts the principle of showing cause I have referred to and reads as follows:

"1. (1) If a contempt is committed in face of the court, it shall not be necessary to serve notice to show cause, but the court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him and has the opportunity to be heard in his own defence, and shall make a proper record of the proceedings.

(2) In all other cases of contempt of court, notice to show cause why he should not be committed to the civil prison or fined shall be served personally."

It is true that the Subordinate Courts Rules only apply to proceedings of a civil nature commenced in any Sessions or Magistrate's Courts, but the very words of the rule I have referred to would presuppose its application to a contempt committed in the face of the court in criminal proceedings as well for the purposes of paragraph 26 in the Third Schedule to the 1948 Act. In any event, even if these rules do not apply stricto sensu in these proceedings, they call at least for a like approach in such proceedings as they do no more than contain a statutory crystallisation of an established principle of law.

I would add that the court's power to imprison should only be exercised in serious cases of contempt. In deciding whether a contempt is serious enough to warrant imprisonment, two factors should be taken into account, first, the likely interference with the due administration of justice and, secondly, the culpability of the offender. Where the imposition of a fine would meet the circumstances an order of committal should be avoided, if at all possible. The English Court of Appeal in the recent case of *Danchevsky* v. *Danchevsky*,[11] no doubt a case of civil contempt for disobedience to an order of court, held that committal orders should only be made when other remedies were unavailable.

Adverting now to the matter before me, the learned President as a result of the statement attributed to the advocate in the record of the proceedings, perhaps understandably acting in the heat of the moment, immediately committed him to imprisonment for 2 days without distinctly stating the specific offence charged against him and without giving him an opportunity of showing cause or answering that charge, in breach of the rules of natural justice and in utter disregard of the provisions of Order XXXVIII rule 1 of the Sub-ordinate Courts Rules or at least the principle under-lying it. The order of committal made must accordingly be unsustainable in law and invalid. I would urge all Presidents and Magistrates to pay meticulous heed to the principles and statutory provisions I have referred to in circumstances such as these, and I would in this context commend to their attention the procedure suggested in *Public Prosecutor* v. *Lee Ah Keh & Others, supra.*

I do not think it necessary in the context of this matter to launch into a diatribe on the relations between the Bench and the Bar; fortunately this is an extremely rare and isolated case. But let me add this. Presidents and magistrates must accept the fact that it is the duty of counsel appearing before them to act fearlessly and with all the force and vigour at their disposal in the interest of the cause they represent but wholly within the bounds of propriety and courtesy in the discharge of their duties as officers of the court. Counsel appearing before these courts must equally remember that in the discharge of their duties they must judiciously use the right and privilege of appearing as such in these courts and not abuse it, and that their conduct must at all times accord with that decorum and dignity which is absolutely essential to the administration of justice and above all, however frustrated or provoked they may be, they must pay that respect due to the court which is the embodiment of the institution of justice in the machinery of which both the courts and the Bar are interdependent and vital components. If counsel has any complaint of unfair treatment then his recourse should not be a challenge to the authority of the court but must of necessity be to direct it to the proper quarters either personally or perhaps more appropriately through the appropriate Bar Committee. Mutual respect and courtesy should always prevail and the utmost restraint exercised from overacting, even at the most trying times. Occurrences of the nature before me will only tarnish the image of justice which we all seek to administer and mar the smoothness of its administration. If this admonition is adhered to then there will be no danger of a repetition of the unhappy events which have culminated in today's proceedings.

For the reason I have given I am constrained to exercise my powers of revision to set aside the order of committal made against the advocate.

However the order I have just made should not be allowed to obfuscate the gravity of the statement attributed to the advocate in the record of these proceedings, and I think this is a proper case for a reference to the appropriate Bar Committee for an enquiry into the conduct of the advocate by his peers in relation to that statement, and I so direct.

Order accordingly.

Solicitors: *R. Rajasingam & Co.*